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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ISAAC NAVARRO-LOMELI, Defendant(s).	Criminal Case No. 08CR0091-L DATE: June 9, 2008 TIME: 10:00 a.m.. Before Honorable M. James Lorenz UNITED STATES' MOTIONS *IN LIMINE* TO: (A) EXCLUDE WITNESSES; (B) PROHIBIT REFERENCE TO PUNISHMENT, EDUCATION, HEALTH, AGE, AND FINANCES; (C) ADMIT EXPERT TESTIMONY; (D) ADMIT DUPLICATES; (E) ADMIT EVIDENCE WITHOUT ESTABLISHING COMPLETE CHAIN OF CUSTODY; (F) PRECLUDE TESTIMONY OF CHARACTER WITNESSES; (G) PRECLUDE EVIDENCE OF DURESS OR NECESSITY; AND (H) PRECLUDE EXPERT TESTIMONY BY DEFENSE WITNESSES TOGETHER WITH STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES

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COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Karen P. Hewitt, United States Attorney, and Aaron B. Clark, Assistant U.S. Attorney, and hereby files its hereby files its motions *in limine* in the above-captioned case. Said motions are based upon the files and records of this case together with the attached statement of facts and memorandum of points and authorities.

DATED: May 23, 2008.

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

s/ Aaron B. Clark
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Assistant United States Attorney

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ISAAC NAVARRO-LOMELI, Defendant(s).	Criminal Case No. 08CR0091-L DATE: June 9, 2008 TIME: 10:00 a.m. Before Honorable M. James Lorenz UNITED STATES' STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES

I

STATEMENT OF THE CASE

On January 9, 2008, a federal grand jury in the Southern District of California returned a two-count Indictment charging the defendant, Isaac Navarro-Lomeli ("Defendant") with Importation of Marijuana, in violation of Title 21, United States Code, Sections 952 and 960 and Possession of Marijuana with the Intent to Distribute, in violation of Title 21, United States Code, Section 841(a)(1). Defendant was arraigned on the Indictment on January 10, 2008, and entered a plea of not guilty.

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II

STATEMENT OF FACTS

Defendant was apprehended on the morning of November 28, 2007, by United States Customs and Border Protection ("CBP") Officers at the Calexico, California (West) Port of Entry. There, Defendant entered the vehicle inspection lanes as the driver, sole occupant, and registered owner of a 1986 Dodge Ram ("the vehicle").

At primary inspection, Defendant provided a negative customs declaration, claimed ownership of the vehicle, and presented a valid Permanent Resident card to CBP Officer Miguel Huerta. He further stated he was headed to work. During his inspection of the vehicle at primary, Officer Huerta noticed an abnormality in the truck bed area: after tapping the bottom of the bed, he noticed that there was no vibration to the top of the bed. Officer Huerta thereafter escorted Defendant and the vehicle to the secondary lot.

At secondary inspection, a Narcotic Detector Dog ("NDD") alerted to the bed of the vehicle. Further inspection of the vehicle ultimately revealed a non-factor compartment in the bed. The compartment contained 9 packages of marijuana, weighing a total of 46.46 kilograms (102.21 lbs.). A pat down of Defendant also revealed a small plastic bindle inside Defendant's wallet. The bindle contained an unweighable amount of cocaine.

In a post-Miranda statement, Defendant admitted that he was paid $1500.00 to smuggle marijuana into the United States.

III

MEMORANDUM OF POINTS AND AUTHORITIES

A. THE COURT SHOULD EXCLUDE WITNESSES DURING TRIAL WITH THE EXCEPTION OF THE GOVERNMENT'S CASE AGENT

Under Federal Rule of Evidence 615(3), "a person whose presence is shown by a party to be essential to the presentation of the party's cause" should not be ordered excluded from the court during trial. The case agent in the present matter has been critical in moving the investigation

forward to this point and is considered by the United States to be an integral part of the trial team. The United States requests that Defendant's testifying witnesses be excluded during trial pursuant to Fed. R. Evid. 615.

B. DEFENDANT SHOULD BE PROHIBITED FROM ARGUING PUNISHMENT, EDUCATION, HEALTH, AGE, FAMILY CIRCUMSTANCES, AND FINANCES TO THE JURY

Defense counsel may wish to raise potential penalties Defendant faces if convicted. Information about penalty and punishment draws the attention of the jury away from their chief function as the sole judges of the facts, opens the door to compromised verdicts, and confuses the issues to be decided. United States v. Olano, 62 F.3d 1180, 1202 (9th Cir. 1995). In federal court, the jury is not permitted to consider punishment in deciding whether the United States has proved its case against the defendant beyond a reasonable doubt. 9th Cir. Crim. Jury Instr. §7.4 (2003). Any such argument or reference would be an improper attempt to have the jury unduly influenced by sympathy for the defendant and prejudiced against the Government. See 9th Cir. Jury Inst. § 3.1 (2000). Therefore, the United States hereby moves *in limine* for the Court to order defense counsel not to mention any penalty or punishment to the jury or to solicit testimony regarding the same.

Likewise, the defense should be prohibited from making reference to or arguing about Defendant's education, health, age, family circumstances, and finances. Defendant may attempt to introduce evidence designed to improperly arouse the sympathy of the jury, such as evidence of his age or personal background. The court should preclude Defendant from presenting such evidence under Federal Rules of Evidence 401, 402, and 403.

Testimony about Defendant's education, health, age, family circumstances, and finances are patently irrelevant to the issues in this case. Fed. R. Evid. 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 402 states the evidence "which is not relevant is not admissible." Testimony about

Defendant's age and personal background are of no consequence to the determination of any essential facts in this case. Likewise, a defendant's right to testify is not absolute. That right does not authorize a defendant to present irrelevant testimony. See United States v. Adams, 56 F.3d 737 (7th Cir. 1995) (proper to exclude video of defendant's children opening gifts on Christmas because video would only develop sympathy for accused and would not establish defendant's whereabouts two days earlier).

Furthermore, the introduction of such evidence would violate Fed. R. Evid. 403. That rule allows a court to exclude relevant evidence where the danger of unfair prejudice or confusion of the issues outweighs the probative value of such evidence. A trial court has "wide latitude" to exclude such prejudicial or confusing evidence. See United States v. Saenz, 179 F.3d 686, 689 (9th Cir. 1999). The admission of testimony about defendant's education, health, age, and finances will tend "to induc[e] decisions on a purely emotional basis . . ." in violation of Fed. R. Evid. 403. See Fed. R. Evid. 403 Advisory Committee Notes; United States v. Ellis, 147 F.3d 1131, 1135 (9th Cir. 1998). Juries should not be influenced by sympathy. 9th Cir. Crim. Jury Instr. § 3.1 (2003).

Thus, the Government moves *in limine* for the court to order defense counsel not to introduce such testimony from Defendant or from any witnesses.

C. ADMIT EXPERT TESTIMONY BY GOVERNMENT WITNESSES

The United States expects to present expert testimony by a United States Drug Enforcement Administration ("DEA") chemist who determined the substance found in Defendant's vehicle was marijuana. The United States also expects to present testimony by a United States Bureau of Immigration and Customs Enforcement ("ICE") Special Agent who has determined the wholesale and retail values in Tijuana and Imperial County, in or about November 2007, of the marijuana seized from Defendant. The Court should admit expert testimony by these two witnesses.

If specialized knowledge will assist the trier-of-fact in understanding the evidence or determining a fact in issue, a qualified expert witness may provide opinion testimony on the issue in question. Fed. R. Evid. 702. It is within the sound discretion of the trial judge to determine

whether or not expert testimony would assist in understanding the facts at issue. United States v. Alonso, 48 F.3d 1536, 1539 (9th Cir. 1995); United States v. Lennick, 18 F.3d 814, 821 (9th Cir. 1994). An expert's opinion may be based on hearsay or facts not in evidence where the facts or data relied upon are of the type reasonably relied upon by experts in the field. Fed. R. Evid. 703. An expert may provide opinion testimony even if it embraces an ultimate issue to be decided by the trier-of-fact. Fed. R. Evid. 704.

The United States expects to present the testimony of a DEA chemist [1/] that the substances seized from the car were cocaine and methamphetamine. At trial, the United States will be required to prove that Defendant knowingly brought marijuana into the United States and that Defendant knew it was marijuana, or some other prohibited drug. See 9th Cir. Crim. Jury Instr. § 9.27 (2003). The United States will also have to show that Defendant knowingly possessed marijuana. See 9th Cir. Crim. Jury Instr. § 9.13 (2003). Defendant's importation and possession of marijuana, or some other controlled substance, are elements of the offenses with which he is charged. Thus, expert testimony that the substance seized from Defendant's vehicle was marijuana, a controlled substance, is relevant and should be admitted. See 9th Cir. Crim. Jury Instr. 9.13 (2003) (stating, "It does not matter whether the defendant knew that the substance was [marijuana]. It is sufficient that the defendant knew it was some kind of prohibited drug."). See also United States v. Orduno-Aguilera, 183 F.3d 1138, 1140 (9th Cir. 1999) (finding government failed to meet its burden of proving that controlled substance defendant was accused of importing and possessing met statutory definition).

In addition, the United States intends to present expert testimony by a federal agent regarding the wholesale and retail values of the methamphetamine seized from Defendant's vehicle. Specifically, an ICE Special Agent will testify as to the wholesale and retail price range for 46.46 kilograms of marijuana in the border region of Mexico and in Imperial County,

[1] The identity and qualifications of the specific testifying DEA Chemist, as well as the ICE Special Agent, will be provided to the defense well in advance of trial.

California. The agent will also testify about how marijuana is consumed by the typical end-user. The expert will testify that the quantity of narcotics seized from Defendant's car was far greater than a consumer would possess for personal use.

The value expert's testimony on the wholesale and retail values of the narcotics seized in this case is relevant to Defendant's intent to distribute. See United States v. Savinovich, 845 F.2d 834, 838 (9th Cir. 1988) (finding that price and quantity of narcotics is relevant to defendant's intent to distribute). The Ninth Circuit has upheld the admissibility of expert testimony as to the retail value of drugs. See United States v. Ogbuehi, 18 F.3d 807, 812 (9th Cir. 1994) ("DEA agents can testify as to the street value of narcotics . . . and counsel can argue reasonable inferences from it.") (citation omitted); see also United States v. Ramirez, 176 F.3d 1179, 1181 (9th Cir. 1999) (finding it "reasonable to infer that a $37,120 shipment of marijuana would not be entrusted to the driver of the vehicle without the driver's knowledge"). Accordingly, no basis exists for excluding this testimony as to the value of the drugs.

It is expected that the Special Agent will base his opinions on his experience investigating these types of cases, as well as his experience interviewing drug traffickers, debriefing confidential informants, and discussing drug value information with other agents.

The United States does not intend to introduce expert testimony regarding structure in its case-in-chief. If the United States presents such evidence in rebuttal, it will do so consistent with United States v. Vallejo, 237 F.3d 1008, as amended, 241 F.3d 1150 (9th Cir. 2001).

D. THE COURT SHOULD ALLOW THE ADMISSION OF DUPLICATES

In the alternative, copies of any documents and items made by the case agent on the night of Defendant's arrest should be properly admitted, in the event that the original documents and items that were in Defendant's possession are no longer available. The United States anticipates having a witness with knowledge of both the originals in Defendant's possession as well as the copies that were made at the time of his arrest.

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original, or (2) under circumstances, it would be unfair to admit the duplicate instead of the original. Fed. R. Evid. 103. The foundation for these duplicates can be established, so they should be admitted at trial.

E. THE COURT SHOULD NOT REQUIRE THE UNITED STATES TO PROVE EACH LINK IN THE CHAIN OF CUSTODY OF THE NARCOTICS

The United States intends to introduce evidence of the 46.46 kilograms of marijuana discovered in the vehicle when Defendant entered the United States. Evidence of the marijuana, which was first seized by inspectors and later tested by a DEA chemist, is admissible because there is a presumption of regularity in its handling by these public officials and the testimony of these witnesses will show that the narcotics have not changed in a material way since its seizure. The United States should not be required to prove every link in the chain of custody in order for narcotics evidence to be admissible.

The test of admissibility of physical objects connected with the commission of a crime requires a showing that the object is in substantially the same condition as when the crime was committed (or the object seized). Factors to be considered are the nature of the article, the circumstances surrounding its preservation and custody, and the likelihood of inter-meddlers tampering with it. There is, however, a presumption of regularity in the handling of exhibits by public officials. United States v. Kaiser, 660 F.2d 724, 733 (9th Cir. 1981), cert. denied, 445 U.S. 856 (1982), overruled on other grounds, United States v. DeBright, 730 F.2d 1255, 1259 (9th Cir. 1984) (en banc). If this Court finds that there is a reasonable possibility that a piece of evidence has not changed in a material way, the Court has the discretion to admit the evidence. Id. The United States is not required, in establishing chain of custody, to call all persons who may have come into contact with the piece of evidence. Gallego v. United States, 276 F.2d 914, 917 (9th Cir. 1960).

The marijuana seized from the vehicle was marked, photographed, secured, and transported in accordance with standard operating procedures. Because the narcotics have not changed in a material way and has been properly preserved, the United States should not have to prove every link in the chain of custody from the time it was seized through the time of trial.

F. TESTIMONY OF CHARACTER WITNESSES

In introducing positive character evidence, a defendant must restrict himself to evidence regarding "law-abidingness" and honesty. A defendant may not introduce evidence concerning specific instances of good conduct, lack of a prior record, or propensity to engage in specific bad acts such as drug smuggling or distribution. United States v. Hedgecorth, 873 F.2d 1307, 1313 (9th Cir. 1987) ("[W]hile a defendant may show a characteristic for lawfulness through opinion or reputation testimony, evidence of specific acts is generally inadmissible.") (citations omitted); United States v. Barry, 814 F.2d 1400, 1403 (9th Cir. 1987); Government of Virgin Islands v. Grant, 775 F.2d 508, 512 (3d Cir. 1985) ("[T]estimony that one has never been arrested is especially weak character evidence.").

Any character evidence Defendant seeks to introduce at trial, therefore, should be limited to evidence regarding his law-abidingness and honesty. Character evidence beyond the scope of these two traits would be inappropriate.

G. THE COURT SHOULD PRECLUDE EVIDENCE OF DURESS OR NECESSITY

Defendant should be precluded from presenting evidence or argument that he imported narcotics due to duress or necessity. Courts have specifically approved the pretrial exclusion of evidence relating to a legally insufficient duress defense on numerous occasions. See United States v. Bailey, 444 U.S. 394 (1980) (addressing duress); United States v. Moreno, 102 F.3d 994, 997 (9th Cir. 1996), cert. denied, 522 U.S. 826 (1997) (addressing duress). Similarly, a district court may preclude a necessity defense where"the evidence, as described in the defendant's offer of proof, is insufficient as a matter of law to support the proffered defense." United States v. Schoon, 971 F.2d 193, 195 (9th Cir. 1992).

In order to rely on a defense of duress, Defendant must establish a prima facie case that:

(1) Defendant committed the crime charged because of an immediate threat of death or serious bodily harm;

(2) Defendant had a well-grounded fear that the threat would be carried out; and

(3) There was no reasonable opportunity to escape the threatened harm.

United States v. Bailey, 444 U.S. 394, 410-11 (1980); Moreno, 102 F.3d at 997. If Defendant fails to make a threshold showing as to each and every element of the defense, defense counsel should not burden the jury with comments relating to such a defense. See, e.g., Bailey, 444 U.S. at 416.

A defendant must establish the existence of four elements to be entitled to a necessity defense:

(1) that he was faced with a choice of evils and chose the lesser evil;

(2) that he acted to prevent imminent harm;

(3) that he reasonably anticipated a causal relationship between his conduct and the harm to be avoided; and

(4) that there was no other legal alternatives to violating the law.

See Schoon, 971 F.2d at 195; United States v. Dorrell, 758 F.2d 427, 430-31 (9th Cir. 1985). A court may preclude invocation of the defense if "proof is deficient with regard to any of the four elements." See Schoon, 971 F.2d at 195.

The United States hereby moves for an evidentiary ruling precluding defense counsel from making any comments during the opening statement or the case-in-chief that relate to any purported defense of "duress" or "coercion" or "necessity" unless Defendant makes a prima facie showing satisfying each and every element of the defense. The United States respectfully requests that the Court rule on this issue prior to opening statements to avoid the prejudice, confusion, and invitation for jury nullification that would result from such comments.

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H. PRECLUDE EXPERT TESTIMONY BY DEFENSE WITNESSES

Defendant must disclose written summaries of testimony that Defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial. The summaries are to describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications. Defendant here has not provided notice of any expert witness, nor any reports by expert witnesses. Accordingly, Defendant should not be permitted to introduce any expert testimony if he fails to disclose such information prior to trial.

If the Court determines that Defendant may introduce expert testimony, the United States requests a hearing to determine this expert's qualifications and relevance of the expert's testimony pursuant to Fed. R. Evid. 702 and Kumho Tire Co. v. Carmichael, 526 U.S. 137, 150 (1999). See United States v. Rincon, 11 F.3d 922 (9th Cir. 1993) (affirming the district court's decision to not admit the defendant's proffered expert testimony because there had been no showing that the proposed testimony related to an area that was recognized as a science or that the proposed testimony would assist the jury in understanding the case); see also United States v. Hankey, 203 F.3d 1160, 1167 (9th Cir.), cert. denied, 530 U.S. 1268 (2000).

IV

CONCLUSION

For the foregoing reasons, the United States respectfully requests that its motions *in limine* be granted.

DATED: May 23, 2008.

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

s/ Aaron B. Clark
AARON B. CLARK
Assistant United States Attorney

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff

v.

ISAAC NAVARRO-LOMELI,

Defendant(s).

Case No. 08CR0091-L

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, AARON B. CLARK, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of UNITED STATES' MOTIONS *IN LIMINE* on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. Robert Henssler, Esq.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 23, 2008.

s/ Aaron B. Clark
AARON B. CLARK